Office - Supreme Court, U.S.
FILED
MAY 17 1957
JOHN T. FEY, Clerk.

No. 105

In the Supreme Court of the United States

OCTOBER TERM, 1956

LENG MAY MA, *Petitioner*

v.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys,

Department of Justice,
Washington 25, D. C.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAR 27 1958
JOHN T. FEY, Clerk

No. 105

In the Supreme Court of the United States.

OCTOBER TERM, 1957

LENG MAY MA, PETITIONER

v.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
MALCOLM R. ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	8

CITATIONS

Cases:

Dong Wing Ott v. *Shaughnessy*, 142 F. Supp. 379	8
Lew Sing v. *Barber*, 215 F. 2d 906	7, 8
Kaplan v. *Tod*, 267 U.S. 228	5
Knauff v. *Shaughnessy*, 338 U.S. 537	5
Kwong Hai Chew v. *Colding*, 344 U.S. 590	5
Ng Lin Chong v. *McGrath*, 202 F. 2d 316	7
Shaughnessy v. *Mezei*, 345 U.S. 206	5
United States ex rel. Lue Chow Yee v. *Shaughnessy*, 146 F. Supp. 3	8

Statutes:

Immigration Act of 1917, 39 Stat. 887, as amended, 8 U.S.C. 154 (1946 ed.):	
Sec. 18	3, 7
Sec. 20	6, 7
Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1101, *et seq.*:	
Sec. 212(d)(5)	2-3, 5
Sec. 237(a)	2, 5
Sec. 243(h)	2, 4, 6, 7, 8
Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781	6

Miscellaneous:

96 Cong. Rec. 11724, 14170, 15632, 15726	6
H.R. 1192, 81st Cong., 1st Sess., pp. 8, 9, 17, 18	6
S. Rep. 2239, 81st Cong., 2d Sess., pp. 4, 10	6
S. Rep. 2369, 81st Cong., 2d Sess., pp. 14-15	6
U.S. Code Cong. Serv., 1950, 81st Cong., 2d Sess., pp. 3911-3912	6

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 916

LENG MAY MA, *Petitioner*

v.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. i; R. 15) is reported at 241 F. 2d 85.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1957 (Pet. App. iv; R. 17). The petition for a writ of certiorari was filed on April 17, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, an excluded alien who has failed to establish her claim of a right to enter the United States, and who was admitted into the country on parole only during the pendency of the exclusion proceedings, is entitled to have an application for a stay of deportation entertained under Section 243(h) of the Immigration and Nationality Act on the ground that, if deported, she would be subject to physical persecution.

STATUTE INVOLVED

Section 243(h) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 214, 8 U.S.C. 1253 (h), provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

Section 237(a) of the same Act provides in relevant part:

> (a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this Act, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. * * *

Section 212(d) of the same Act provides in relevant part:

* * * * * * * * *

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

* * * * * * * * *

Section 18 of the Immigration Act of 1917, 39 Stat. 887, as amended, 8 U.S.C. 154 (1946 ed.), provides in relevant part:

All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. * * *

STATEMENT

Petitioner is a native of China who claimed to have acquired United States citizenship at birth on the statutory ground that her father was a United States citizen. Upon her arrival in this country on May 4, 1951, and subsequent thereto, she was accorded hearings by the Immigration and Naturalization Service, which found that she had failed to establish her identity as a United States national.

She was ordered excluded by a Board of Special

Inquiry on November 19, 1952 and the Board of Immigration Appeals affirmed the order on December 3, 1953. On January 5, 1954, she was notified to surrender herself for deportation to China.[1] She then applied for a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1253(h)) alleging that deportation would subject her to physical persecution and probable death. She was advised by the Immigration and Naturalization Service that, since she was excluded from admission to the United States, she was not eligible for the relief afforded by Section 243(h).

Thereafter, she filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. In the petition, she contended that the Service's ruling was a denial of due process and an abuse of discretion, and that her contemplated deportation was contrary to law and constituted unusual and inhumane punishment (R. 3-6).

The petition for habeas corpus was denied by the District Court on the ground that it did not state facts sufficient to warrant the writ (R. 8). On appeal, the judgment was unanimously affirmed by the Court of Appeals for the Ninth Circuit (R. 17).

ARGUMENT

Section 243(h) of the Immigration and Nationality Act of 1952, under which petitioner made her application, provides that the Attorney General "is authorized to withhold deportation of any alien within the

[1] The files of the Immigration and Naturalization Service show that petitioner had been released under bond on August 11, 1952.

United States'" to any country in which he believes the alien would be subject to physical persecution. As the court below held, petitioner is not in a legal sense "within the United States" to come within that statute.

While she was detained in custody for approximately fifteen months and enlarged under parole for some seventeen months, this was merely to give her an opportunity to prove her eligibility to enter. Almost immediately after the final administrative decision as to her ineligibility to enter in December 1953, she was ordered to surrender to the Immigration Service. She is an alien who has been *excluded*, legally in the position of one who has come to the border and not been allowed to come in. This is her status by virtue of Section 212(d) of the 1952 Act (*supra*, pp. 2-3), and even without statutory authority her status under prior laws. *Kaplan* v. *Tod*, 267 U.S. 228.

As an excluded alien, petitioner must, under the statute, be sent back to the country whence she came. This is true either under Section 237(a) of the 1952 Act, in effect when petitioner was finally excluded (*supra*, p. 2), or under Section 18 of the Immigration Act of 1917, in effect when petitioner first made application for admission (*supra*, p. 3). Petitioner's argument (Pet. 7-8) that she is not subject to the provisions of Section 237 of the 1952 Act because not excluded under the 1952 Act thus does not aid her position. She is still an excluded alien who has never in a legal sense come "within the United States."

Expulsion and *exclusion* are two concepts having clearly defined practical, historical, and legal distinctions. *Kwong Hai Chew* v. *Colding*, 344 U.S. 590; *Knauff* v. *Shaughnessy*, 338 U.S. 537; *Shaughnessy* v.

pose of enabling him to apply for naturalization, which he ultimately obtained. The Court of Appeals for the Ninth Circuit held, as in this case, that Section 243(h) was inapplicable. Since that decision, there have been decisions to the same effect in the Southern District of New York, the district of the other most important port of entry. *United States ex rel. Lue Chow Yee* v. *Shaughnessy*, 146 F. Supp. 3; *Dong Wing Ott* v. *Shaughnessy*, 142 F. Supp. 379.

CONCLUSION

For the reasons stated above, we believe that the decision below is correct. However, in view of the prior grant of certiorari in the *Jew Sing* case in which, despite certain factual differences, the technical legal issue was the same, we do not oppose certiorari if the Court should conclude that the issue still warrants definitive resolution.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

MAY 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957—426309/P.O. 1275